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Fair Use and Audiovisual Criticism

By BRIAN S. O'MALLEY*

I Introduction

The critic, despised but not ignored, stands between the artist and the audience, much as Saint Peter stands at the gates of heaven, or Cerberus at the entrance of Hades. Exercising considerable power over the artistic and financial success of the artist's work and career, the critic's word can ring the artist into the glory of recognition, or drive him down to the perdition of obscurity. The critic expresses these opinions in mere words—as the light of pure reason and analysis, or a quote from the artist's work.

While the role of the critic has not changed fundamentally over the years, the art forms critiqued have. Video and film swim into the ken of the critic, who speaks now not only from the printed page, but from radio and television. His quotes from the work, delivered for illustration, come not just as mere words, but in kind, as excerpts from the audio and visual works reviewed.

The use of quotations from copyrighted works in criticisms in order to illustrate the critic's arguments has long been allowed by courts under the doctrine of fair use.¹ Traditionally, courts have had in mind literary works,² or scientific writings,³ and have only recently broached the subject of visual or audiovisual works. The question arises, then, whether an excerpt from a film or video work used for purposes of criticism, com-

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1. An early case is *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901). The fair use provision of the Copyright Act of 1976 also permits fair use in such areas as "news reporting, teaching, (including multiple copies for classroom use), scholarship, or research . . ." 17 U.S.C. app. § 107 (1976). See notes 17-34 and accompanying text, *infra*.

2. 9 F. Cas. at 344.

3. *Farmer v. Elstner*, 33 F. 494, 496 (E.D. Mich. 1888).

ment or review should be treated like an excerpt from a written work similarly used.

Two recent decisions, *Roy Export Co. v. Columbia Broadcasting System*,⁴ and *Iowa State University v. American Broadcasting and ABC Sports, Inc.*,⁵ have found infringement in the use of film clips from copyrighted films. Defenses of fair use were denied in both cases. The court in *Iowa State* rejected the fair use defense, implicitly saying that ABC's use of the plaintiff's film amounted to "corporate theft,"⁶ and that ABC's bad faith conduct was "not irrelevant to the fairness of its use."⁷ The court in *Roy Export* cited this reasoning and denied CBS's motion to find fair use as a matter of law.⁸ Neither court dealt with the question of whether either use might be considered criticism or review, or whether any use of audiovisual materials might be considered fair use for that purpose.

This note will examine the nature of fair use, focusing on fair use for the purposes of criticism, comment and review.⁹ The note will look at the kinds of criticism allowed under the doctrine of fair use, the nature of criticism itself, and will propose a method of analyzing fair use in critical works. After examining the problems of fair use of visual and audiovisual works, the note will examine the decisions in *Iowa State* and *Roy Export* and discuss the effect they might have on the fair use of audiovisual materials.

II

Copyright and Fair Use

A. Copyright Law

The first English copyright law was enacted in 1709¹⁰ and gave authors the exclusive right to copy and publish their works. In 1785, Lord Mansfield spoke of the application of the Act:

we must take care to guard against two extremes equally prej-

4. 503 F. Supp. 1137 (S.D.N.Y. 1980).

5. 621 F.2d 57 (2d Cir. 1980).

6. *Id.* at 61.

7. *Id.* at 62.

8. 503 F. Supp. at 1147. The court also said that in addition to "the four factors," see note 17, *infra*, a jury could also find "that CBS's use of the copyrighted material was in bad faith." *Id.* at 1146. See notes 108-13 and accompanying text, *infra*.

9. See note 37, *infra*.

10. 8 Anne, c.19 (1709).

udicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their Ingenuity and Labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹¹

United States copyright law has these same goals. Article I, section 8 of the U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"¹² The current American copyright statute, the Copyright Act of 1976,¹³ has expanded "works of authorship" to include literary works, musical works, pictorial, graphic, and sculptural works, audiovisual works and sound recordings.¹⁴ The Act grants the creator a collection of rights in the copyrighted work,¹⁵ but also enumerates a number of limitations on and exceptions to those rights.¹⁶ In this way, the Act avoids the extremes spoken of by Lord Mansfield: it protects the creator's investment by reserving certain exclusive rights, and promotes "the progress of the arts" by allowing others specific and limited rights to use the work.

B. Fair Use

One of the exceptions to the rights of the creator is the doctrine of fair use, codified at section 107 of the Copyright Act.¹⁷

11. *Sayre v. Moore*, 1 East, 361, 102 Eng. Rep. 139, n.140 (K.B. 1785).

12. U.S. CONST. art. I, § 8. THE FEDERALIST No. 43 (J. Madison), says that the Federal Government can best deal with the matter, and that "[t]he copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."

13. 17 U.S.C. app. (1976).

14. 17 U.S.C. app. § 102(a) (1976).

15. "(1) to reproduce the copyrighted work . . . ; (2) to prepare derivative works . . . ; (3) to distribute copies . . . ; (4) to perform the copyrighted work publicly; and (5) to display the copyrighted work publicly." 17 U.S.C. app. § 106 (1976).

16. Sections 107-12 place general limitations on exclusive rights: fair use (§ 107); reproduction by libraries and archives (§ 108); the effect of a transfer of a particular copy or phonorecord (§ 109); exemption of certain performances and displays (§ 110); secondary transmissions (§ 111); and ephemeral recordings (§ 112). Sections 113-18 limit the scope of particular exclusive rights: Pictorial, graphic and sculptural works (§ 113); sound recordings (§ 114); compulsory license for making and distributing phonorecords (§ 115); coin-operated phonorecord players (§ 116); use in conjunction with computers and similar information systems (§ 117); and use of certain works in connection with noncommercial broadcasting (§ 118).

17. Section 107 of the Copyright Act provides in pertinent part:

Notwithstanding the provisions of section 106, . . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any

Fair use has been called "the most troublesome [issue] in all copyright law"¹⁸ and "so flexible as virtually to defy definition."¹⁹ The purpose of section 107 is to allow a defense to infringement when the copying, in the view of the court, is fair under the circumstances.²⁰ Stated another way, the fair use doctrine "permits a copyrighted work to be used without authorization in various ways and, among other things, allows the taking, appropriation, or use of a certain amount of material from a copyrighted work under certain circumstances."²¹ Copying that courts in the past have found to be fair use includes use in areas suggested by the language of section 107: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"²²

It is important to remember that fair use is not limited to these categories, nor is copying that falls in one of the enumerated categories automatically fair use.²³ The use must always be considered in light of the four factors set out in section 107: (1) the purpose and character of use; (2) the nature of the copyrighted work; (3) the amount of use; and (4) the effect of the use upon the potential market value.²⁴ These factors were derived from cases dealing with the question of fair use, and this section was intended to restate the law, "not to change, narrow, or enlarge it in any way."²⁵ It is also to be emphasized that the four factors do not define fair use; they are simply fac-

other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

18. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

19. *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 130-31 (S.D.N.Y. 1968).

20. Register's 1961 Report at 24. See also Annot., 23 A.L.R. 3d 139, 156-68 (1969) for a discussion of federal courts' jurisdiction and handling of fair use.

21. Annot., 23 A.L.R. 3d 139, 164 (1969).

22. 17 U.S.C. app. § 107 (1976). See note 17, *supra*.

23. N. BOORSTYN, COPYRIGHT LAW, § 5:2, at 119 (1982).

24. 17 U.S.C. app. § 107 (1976). See note 17, *supra*.

25. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) [hereinafter cited as HOUSE REPORT].

tors to be considered.²⁶ Other factors can be and have been considered.²⁷ Fair use is determined using case-by-case²⁸ analysis based on an examination of all the evidence²⁹ and the circumstances³⁰ of the case. In short, the court is left with great discretion in determining whether the use is fair in a given situation.³¹

Despite the equitable nature of the fair use defense, it is generally considered a question of fact for the jury.³² The court in *Lawrence v. Dana*³³ viewed it as a mixed question of law (whether the use was allowable or infringing), and fact (what use the defendant made of the copyrighted work).³⁴

III Criticism and Fair Use

Courts have long recognized as fair use the copying of written works for the purposes of criticism and review. This recognition has largely been for illustrative purposes,³⁵ as only a few courts have had the issue of fair use and criticism directly before them.³⁶ The best explanation for the courts' indulgence

26. 17 U.S.C. app. § 107 (1976). "[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute." HOUSE REPORT, *supra* note 25, at 66.

27. M. NIMMER, NIMMER ON COPYRIGHT 13.05[A], at 13-56 to 13-57 (1980). See also Cohen, *Fair Use in the Law of Copyright*, in COPYRIGHT AND RELATED TOPICS 115 (1981): the intent with which the use is made; amount of user's labor involved, benefit gained by user, value of material used; *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) and *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966): public interest. It should be noted that the holding in *Time, Inc. v. Bernard Geis Assoc.* has rarely been followed. The court in *Iowa State* called the circumstances of *Time* an "almost unique experience," and believed that "such situations are rare." 651 F.2d at 61 n.6.

28. HOUSE REPORT, *supra* note 25, at 66.

29. *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *N.Y. Trib. v. Otis & Co.*, 39 F. Supp. 67 (D.C.N.Y. 1941).

30. *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (D.C. Wis. 1941).

31. 3 M. NIMMER, *supra* note 27, § 13.05[A], at 13-57.

32. *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Eisenschiml v. Fawcett Publications Inc.*, 246 F.2d 598, 604 (7th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

33. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136).

34. *Id.* at 56. For the purposes of summary judgment, however, if the facts are not in dispute, fair use can pose a question of law. *Meeropol v. Nizer*, 417 F. Supp. 1201, 1213 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061, *cert. denied*, 434 U.S. 1013 (1978); *Higgins v. Baker*, 309 F. Supp. 635, 637 (S.D.N.Y. 1970).

35. *Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841) (No. 4,901); *Farmer v. Elstner*, 33 F. 494, 496 (E.D. Mich. 1888).

36. *In Loew's, Inc. v. Columbia Broadcasting System, Inc.* 131 F. Supp., 165, 175

towards critics and commentators is that criticism does not fulfill the same function as the work reviewed³⁷—it supplements, but it does not supplant.³⁸

There is no “legal” definition of criticism³⁹ as it applies to copyright that might indicate when fair use should apply. The Eleventh Edition of the *Encyclopaedia Britannica* reflects the traditional view of criticism as a scholastic discipline when it defines criticism as “the art of judging the qualities and values of an aesthetic object, whether in literature or the fine arts.”⁴⁰ The fine arts can be broken down into art, drama, literature, and music.⁴¹

Yet any copyrighted work can be the subject of criticism, and if any part of it can be used in that criticism, it could come under the aegis of fair use. Even the most transitory art forms, e.g. pantomime, could be copied in some manner (videotape, film, photographs) for use in a forum (e.g. television) wherein they could be criticized. In addition, the sciences, when embodied in a book, paper or other copyrightable form, can be the subject of criticism.⁴²

A. Forms of Criticism

Criticism relevant to a discussion of fair use can be broken down into four general areas: reviews, scholarly criticism, criticism in response to criticism, and parody.

Reviews generally involve single works of art, drama, cinema

(S.D. Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam*, 356 U.S. 43, *rehearing denied*, 356 U.S. 934 (1958). The court dealt with the issue of parody as criticism and referred to the right of critics to quote extensively for purposes of illustration and criticism. *See also* the discussion on parody, notes 48-55 and accompanying text, *infra*. *See also* the discussion and cases relating to response to criticism, notes 45-47 and accompanying text, *infra*.

37. 3 M. NIMMER, *supra* note 27, § 13.05[B], at 13-65.

38. *Id.* at 13-66. “Indeed, such quotations in the form of criticisms are frequently of great value to the author himself, and may actually increase the sale of his book.” *Farmer v. Elstner*, 33 F. at 496.

39. The legal significance of the terms “review”, “comment” and “criticism” appear to be equivalent.

40. 7 *Encyclopaedia Britannica* 468 (11th ed. 1910).

41. 8 *ENCYCLOPEDIA AMERICANA* 220-224 (1970).

42. What should be distinguished here is the use of a scientific work for further research in the same field. Such use may be considered fair in the interests of the progress of science and the useful arts. It cannot be considered criticism, and is not within the scope of this article. *See West Publishing Co. v. Edward Thompson Co.*, 169 F. 833, 866 (E.D.N.Y. 1909). *See also Yankwich, What is Fair Use?*, 22 U. CHI. L. REV. 203, 209 n.28 (1954).

or literature. They appear in magazines and newspapers, and deal almost exclusively with recently published or released works. This type of criticism can hardly be said to fulfill the same function as the work reviewed. In fact, it serves the quite different and valuable function of bringing the creator's work to the public's attention.⁴³

Scholarly works of criticism are more considered works, generally dealing with less current matters, covering broader areas and often dealing with more than one work. Published as books, monographs or as articles in scholarly journals, such criticism might deal with some aspects of a writer's works, a school of painting, or trends and theories in one of the social sciences. The difficulty in ascertaining fair use for reviews and scholarly works is that while courts have repeatedly given their approval of these types of criticism, there have been no decisions that determine the limits of the use such criticism can make of the criticized work.⁴⁴

The third category is criticism in response to criticism. Section 107 does not specifically mention the fair use of excerpts from a critical or derogatory work when used in a different work written in response to criticism. However, the House Report accompanying the Copyright Act of 1976 would permit reproduction of those parts "necessary to permit understandable comment" on a work containing "unfair, inaccurate, or derogatory information."⁴⁵ In *Consumers Union of the United States, Inc. v. Hobart Mfg. Co.*,⁴⁶ the defendant, a dishwasher manufacturer, reprinted statements from the plaintiff's copyrighted magazine article in the defendant's sales bulletin, criticizing the plaintiff's testing of its product. The court held that the plaintiff could not, by copyrighting its unfavorable remarks in its magazine article, prevent the defendant from repeating those remarks and refuting them.⁴⁷

43. Cohen, *Fair Use in the Law of Copyright*, in COPYRIGHT AND RELATED TOPICS 116 (1964).

44. Latman, *Fair Use of Copyrighted Works, Study No. 14* 19 (1958), prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 86th Cong., 2d Sess.

45. HOUSE REPORT, *supra* note 25, at 73.

46. 180 F. Supp. 275 (S.D.N.Y. 1960).

47. Fair use was denied in a similar case, *Amana Refrigeration v. Consumers Union of U.S.*, 431 F. Supp. 324 (N.D. Iowa 1977), because the defendant's brochure, which quoted from the consumer magazine article, contained no criticism of the article or the consumer magazine.

Parody and burlesque⁴⁸ are humorous works which derive their humor from imitating and mocking other, usually serious works.⁴⁹ In *Hill v. Whalen & Martell, Inc.*, the court stated that "[a] copyrighted work is subject to fair criticism, *serious or humorous*."⁵⁰ More recently, the court in *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Productions*,⁵¹ agreed: "[t]he underlying rationale for applying the 'fair use' doctrine to parody and satire is that these art forms involve the type of original critical comment meant to be protected by section 107 of the Copyright Act of 1976."⁵²

One case that has taken the opposite view is *Benny v. Loew's Inc.*,⁵³ which rejected a defense of burlesque as "literary criticism." In holding that a 30-minute television burlesque of a copyrighted play was a substantial taking⁵⁴ and too excessive for fair use, the court said that calling burlesque "criticism" in hopes of invoking the doctrine of fair use is "parody upon the meaning of criticism."⁵⁵

B. Criticism and the Four Factors

The use of a copyrighted work in criticism or comment does not mean that the use is *ipso facto* fair.⁵⁶ The four factors of section 107 have to be applied to the circumstances of the case. While use in a work of criticism may on its face appear to be justified, another factor may shift the equity in favor of denying fair use. These factors are closely interrelated.⁵⁷

48. These terms are often used interchangeably, but have been given technically different meanings. See Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130; Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615, 616 n.6. One writer has distinguished burlesque from parody in that the element of criticism is absent from the former, leaving humor as the sole object. *Study No. 14, supra* note 44, at 9.

49. Light, *supra* note 48, at 616.

50. 220 F. 359, 360 (S.D.N.Y. 1914) (emphasis added).

51. 479 F. Supp. 351 (D.C. Ga. 1979).

52. *Id.* at 357.

53. 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam*, 356 U.S. 43, *rehearing denied*, 356 U.S. 934 (1958).

54. In order to state a cause of action for infringement, the copyright owner must establish that the defendant copied his work. Since proof of the act of copying is nearly impossible, the owner need only prove that the defendant had access to the allegedly copied work, and that the works are substantially similar. Some courts refer to this last requirement as substantial taking. See 3 M. NIMMER, *supra* note 27, at 13-5 to 13-9.

55. 239 F.2d at 537.

56. See note 23 and accompanying text, *supra*.

57. See notes 79-86 and accompanying text, *infra*.

The following is an outline of the fair use factors as they relate to fair use for critical purposes.

1. *Purpose and Character of Use*

The purpose of the use is obviously criticism, but the character of the use must also be examined. Section 107(1) suggests as one characteristic "whether such use is of a commercial nature or is for nonprofit educational purposes. . . ."⁵⁸ Use for nonprofit purposes will not in and of itself make the use fair,⁵⁹ nor does commercial use preclude a finding of fair use,⁶⁰ although it "tends to cut against a fair use defense."⁶¹ Related to the profit/nonprofit aspect is whether the use is for scholarship or research. Such use has been held to enlarge the scope of what may be used.⁶² A popularized account, however, will not deny fair use.⁶³ No one aspect of use will determine if that use is justified.⁶⁴

2. *Nature of the Copyrighted Work*

Printed material presents few problems for the critic wishing to quote a portion of a work. The only consideration is whether the amount used is excessive. The nature of the visual and audiovisual arts, on the other hand, present peculiar problems for the application of the fair use doctrine.⁶⁵

3. *The Amount of Use*

One of the most troublesome aspects of fair use in criticism is the extent of the quotation or excerpt that is allowed. The concession made by publishers in the beginnings of books—that no more than 300 words may be used in the form of brief quotations for critical articles or reviews—has been held not to be dispositive on the question of fair use.⁶⁶ The copying can-

58. 17 U.S.C. app. § 107(1) (1976).

59. See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243 (D.C.N.Y. 1978).

60. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied* 385 U.S. 1009.

61. *Triangle Publications v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1175 (5th Cir. 1980).

62. *Loew's, Inc. v. CBS, Inc.*, 131 F. Supp. 165, 175 (S.D. Cal. 1955); *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd per curiam*, 356 U.S. 43, *rehearing denied*, 356 U.S. 934 (1958).

63. *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013.

64. See note 23 and accompanying text, *infra*.

65. See notes 81-100 and accompanying text, *infra*.

66. *Meeropol v. Nizer*, 560 F.2d at 1061.

not, however, be so extensive that the criticism becomes a substitute for the original: "Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed."⁶⁷ The two extremes that Lord Mansfield spoke of⁶⁸ can be paraphrased as they apply to criticism: Criticism should not be severely limited by prohibiting the use of examples for illustration, but neither should critics be given free rein to exploit or supplant copyrighted works.⁶⁹

One example of a supplanted copyrighted work occurred in *Robert Stigwood Group v. O'Reilly*.⁷⁰ The defendants were a group of priests who performed without permission the musical *Jesus Christ Superstar*, changing some of the words and parts of the plot to align the musical with their religious beliefs. They were sued for infringement, and their defense was that their version was a "literary and religious criticism" of the plaintiffs' work. The court rejected the defense, noting that while a critical review with extensive quotes can be made in order to comment effectively, the defendant could not copy practically verbatim, with a few variations to make a "better" version.⁷¹

Not all "quoting" need be so extensive to be unfair use. Justice Story, in what was the first American case to deal with the doctrine of fair use,⁷² recognized that the quality of the excerpt was as important as the quantity. "[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used"⁷³ The court in *Roy Export* acknowledged the importance of the "quality" or "value" of the excerpt used in deter-

67. *Lawrence v. Dana*, 15 F. Cas. 26, (C.C.D. Mass. 1869) (No. 8,136).

68. See note 11 and accompanying text, *supra*.

69. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136).

70. 346 F. Supp. 376 (D.C. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096, *cert. denied*, 429 U.S. 848.

71. *Id.* at 385. See also *Warner Bros. v. ABC, Inc.*, 654 F.2d 204 (2d Cir. 1981). The plaintiff there owned the rights to the comic book character Superman and sued the defendant whose television character "Hero" was allegedly substantially similar to Superman. The court upheld the lower court's finding of no substantial similarity but questioned whether a parody defense could "shield an entire work that is substantially similar to and in competition with the copyrighted work." *Id.* at 211.

72. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

73. *Id.* at 348.

mining fair use, as it applies to the use of film segments. "[T]here would be a substantial taking of 'Gone With the Wind' if somebody just took the burning of Atlanta . . . ten or fifteen minutes of a three or four hour movie."⁷⁴

4. *Effect Upon the Potential Market*

Aside from a situation where so much of the plaintiff's work is used that the defendant's critical work has supplanted it, the effect upon the potential market for or value of the criticized work is not an important consideration in analyzing fair use for critical purposes. The effect upon the potential market of an adversely criticized work, to the extent that it discourages potential purchasers of a book or viewers of a film, is not a factor in denying fair use.⁷⁵ To allow such a consideration would deter all criticism.

C. Nature of Criticism

There is often a fine line between use that is proper for criticism, and use that amounts to exploitation. Even if courts have free rein to make a decision on fair use based on the circumstances of each case, consistency when dealing with criticism is essential. The critic (as well as the owner of the forum in which the critic speaks) needs a standard by which to appraise his use of the copyrighted work, lest fear of invoking infringement actions inhibits any criticism.

What is proposed here is an analysis of criticism that will help critics and courts draw the line between criticism and exploitation. Essential to this analysis is ascertaining the exact subject of the criticism. Does the criticism focus on the work reviewed, or upon the subject of that work? Does the criticism examine the expression of the idea or the idea itself? It is a maxim of copyright law that expression (the work) can be copyrighted, but the idea expressed (the subject of the work) cannot.⁷⁶ This can provide a practical distinction upon which to base a finding of fair use. For example, consider a film made of a Shakespeare play, for which of course, the film maker did not create the dialogue or the plot. If a televised review of the film containing film clips focuses on the film itself and dis-

74. 503 F. Supp. at 1145, citing transcript at 774.

75. See Yankwich, *supra* note 42, at 208.

76. 17 U.S.C. app. § 102(b) (1976). For a discussion of the idea-expression dichotomy, see 3 M. NIMMER, *supra* note 27, § 13.03[A][1], at 13-77 to 13-30.

cusses the director's ability to interpret Shakespeare or the cinematographer's talents, it has focused on the work reviewed, which is the copyrighted expression. If, on the other hand, the Shakespeare play itself is the subject of a televised commentary, and the film is merely used as part of the commentary, then the subject of the commentary would also be the subject of the film.

If the film and the script are by the same creator, the dialogue and plot then become part of the expression. The subject of the film is then simply whatever cannot be copyrighted. Typically this is some general idea used in the film which is not original with the film's creator, and therefore not copyrightable. In a war movie, for instance, neither the battle of Gettysburg nor the historic events surrounding it can be copyrighted.⁷⁷ The makers of a western cannot corner the concept of the Old West or a gunfight simply by filming a story using these elements and copyrighting it. If a televised review had as its subject the Old West or the battle of Gettysburg, it would have the same subject as the subject of the film. If, however, the review had as its subject the cinematic treatment of the Civil War or violence in the movies, the subject of the review would be the expression in the films.

Once the true subject of the criticism has been determined, a better judgment can be made as to whether fair use was made of the work criticized. If the work's expression is being examined, more latitude should be allowed to what is considered fair use. This is because the true function of criticism is being realized—the analysis of the abilities of the creator. If on the other hand, the subject of the criticism is also the subject of the work being criticized, less latitude should be allowed. There is in this case greater danger of the work being used, not for an analysis of that work, but for that work's original purpose and intrinsic value.

Returning to the example of the Shakespeare film, the function of the critic is realized when the expression of the filmmaker is examined. Here the critic is doing his true creative work—analyzing and assessing the abilities and creative product of the filmmaker. On the other hand, if the critic has as his subject Shakespeare, or the particular play, the same subject as the filmmaker, he is exploiting the filmmaker's work for his

77. *Hoehling v. Universal Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980).

own purposes. His function as critic may be realized with regard to Shakespeare, but it is not realized with regard to the film. Having the same subject as a work, the critic cannot use that work unless his purpose is to criticize that work.⁷⁸

This analysis can be illustrated by looking at two cases; one which deals with parody and the other with response to criticism. In *MCA, Inc. v. Wilson*,⁷⁹ the defendants included in their musical what they alleged was a parody of the plaintiff's song. One of the defendants admitted, however, that the song they had written was intended to be a burlesque not of the plaintiff's song but of "the [19]40's and World War II activity," also the subject of the plaintiff's song. The court held that this was not fair use. In terms of the "subject of criticism" analysis, since the expression—the words and music of the song—was not the subject of the parody, it could not be used fairly in a parody of its subject.

In *Amana Refrigeration v. Consumers Union of the U.S., Inc.*, the court⁸⁰ ruled on a case involving alleged comment upon criticism. A 1968 article in Consumer Report magazine favorably reviewed a product of the Amana Company, but a 1973 article contained an unfavorable review. A brochure published by Amana in response to the 1973 article quoted a paragraph from the 1968 article, but made no mention of the 1973 review. The court rejected the defense of fair use, finding that the Amana brochure contained no comment or criticism of either Consumer Report article. Here, as in *MCA, Inc. v. Wilson*, the alleged criticism had the same subject as the work criticized: the favorable aspects of the Amana product. The Amana brochure also performed the same function as the 1968 article which it quoted: to praise the Amana products. Accordingly, because the two works served similar purposes, little latitude was given to the claim of fair use.

78. It is important to keep in mind that this analysis of criticism involves only the first of the four factors listed in § 107, purpose and character of use. As will be seen in the subsequent analysis of cases, the other factors, particularly amount and substantiality of use, play important parts in the determination of fair use.

79. 199 U.S.P.Q. (BNA) 166 (D.C.N.Y. 1976).

80. 431 F. Supp. 324 (D.C. Iowa 1977).

IV

Nature of the Copyrighted Work— The Visual Arts

The fair use of the visual arts for purposes of criticism is largely an untested field, and there are few cases that have any precedential value. The Copyright Act protects many forms of visual art—dramatic works, pictorial, graphic and sculptural works, pantomimes, choreographic works, motion pictures and audiovisual works.⁸¹ The section on fair use, however, makes no special mention of the treatment of visual works. The House Report concerns itself mainly with new technology and its methods of copying the entire copyrighted work: off-air taping for home, educational and archival use,⁸² and classroom and library copying.⁸³ Copying for home use and for archival purposes has little in common with fair use of the excerpts in the criticism. However, such copying may be important to the critic who must obtain a copy of the work to excerpt for the purpose of criticism.⁸⁴ While copying for the classroom may well involve copying the entire work and may also involve some criticism, the distribution is limited, and the copying is for a protected public purpose.⁸⁵

A. The Single Visual Image

Single visual images, such as photographs, movie stills, and sculpture, are by virtue of their brevity and “wholeness” easier to exploit. The single visual image must be viewed in its entirety to be analyzed at all. There is no way to use an “excerpt” as one can with other types of criticism.⁸⁶

One writer has explained this need for “wholeness” in terms of subject and expression: in a writing, “the subject and its fixed form of expression are already at one symbolic remove from each other. A photograph is closer to its subject—its transformation . . . relates it directly to the physical subject it represents.”⁸⁷ The difficulty this creates for fair use in criti-

81. 17 U.S.C. app. § 102(a), at 3-6 (1976).

82. HOUSE REPORT, *supra* note 25, at 73.

83. HOUSE REPORT, *supra* note 25, at 68, 69.

84. See note 98, *infra*.

85. See HOUSE REPORT, *supra* note 25, at 66-70.

86. Timberg, *A Modernized Fair Use Code for the Electronic as Well as the Gutenberg Age*, 75 NW. U.L. REV. 193, 219 (1980).

87. Timberg, *New Forms of Media and the Challenge to Copyright Law*, in FAIR

cism of visual materials is that the critic must expropriate the entire subject of the work to provide an example of the criticized work. Whether it is his intent to comment on that subject is irrelevant—by taking the image in its entirety he has in effect made its subject his subject as well.

Nonetheless, cases dealing with single visual images have allowed fair use of the images. Without discussing the problems inherent in copyrighted visual material, the court in *Triangle Publications v. Knight-Ridder Newspapers*⁸⁸ permitted the fair use of a magazine cover in a competitor's ad because of *de minimis* harm to the plaintiff's copyright. The court's analysis of the fourth factor listed in section 107, the effect on potential market value, was dispositive. In *Bruzzone v. Miller Brewing Co.*,⁸⁹ a market researcher used five or six isolated frames from television commercials to create "photoboards" which he sent out with questionnaires to perform his research. In finding fair use, the court not only acknowledged that the negative effect on the advertisement's market value was minimal, but also that the marketing researcher's use of the commercials was for the purpose of "criticism, comment, news reporting, teaching, scholarship, and research."⁹⁰

Fair use in visual copying was disallowed, however, in *Walt Disney Productions v. Air Pirates*.⁹¹ The court held that the defendants' use of the plaintiff's cartoon characters, in situations which contrasted with their innocent images, involved more taking than was necessary to recall or conjure up the original⁹² for the purposes of parody. Here, the third factor, amount and substantiality of use, played a major part in the court's decision. The court also dealt with the purpose and character of the use, pointing out that "the essence of this parody did not focus on how the characters looked, but rather parodied their personalities, their wholesomeness and their innocence."⁹³ This distinction is important. Had the drawings

USE AND FREE INQUIRY COPYRIGHT LAW AND THE NEW MEDIA 253 (J. Lawrence & B. Timberg eds. 1980) (footnotes omitted).

88. 626 F.2d 1171 (5th Cir. 1980).

89. 202 U.S.P.Q. (BNA) 809 (N.D. Cal. 1979).

90. *Id.* at 811.

91. 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

92. The "recall or conjure up" standard was derived from *Berlin v. E.C. Comics*, 329 F.2d 541 (2d Cir. 1964). The defendant in *Air Pirates* argued that extensive copying was necessary for the "best parody", but the court balanced the need for "best parody" against the rights of the copyright owner.

93. 581 F.2d at 758 (footnote omitted).

of the Disney characters alone been the subject of the parody, this expression clearly would have been available for fair use. Since the defendants were attacking the underlying idea of wholesomeness, they were less free to use the characters.⁹⁴ To express this in terms of the "subject of the criticism" analysis, the subject of the defendant's parody was not just the visual image of the comic characters, but the idea which the characters were originally created to portray: wholesomeness and innocence. The characters' personalities were the subject of the plaintiff's original work, and they were also the subject of the defendant's parody, so a fair use defense would have had even less merit.

B. Audiovisual Works

Audiovisual works are defined by the Copyright Act as consisting of

"a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."⁹⁵

No reported case has yet extended the doctrine of fair use to comment and criticism of audiovisual works. The *House Report*, however, suggests that the fair use doctrine should extend to educational broadcasters, although narrowly

94. The court said that "a cartoon character's image is intertwined with its personality and other traits," 581 F.2d at 757, which raises the question of whether copying a cartoon character's visual image is necessary for a critique of its personality or the cartoon's story line. This issue was dealt with in another controversy involving Walt Disney, related in Lawrence, *Donald Duck v. Chilean Socialism: A Fair Use Exchange* in FAIR USE AND FREE INQUIRY. A number of book sellers attempted to import copies of an English language translation of a book critical of the Disney comic books published in Chile. The critique (A. DORFMAN & A. MATTELART, HOW TO READ DONALD DUCK: IMPERIALISTIC IDEOLOGY IN THE DISNEY COMIC (D. Kunzle trans. 1975)) used frames and characters from the comic books. The shipment was seized by Customs, pending a decision on infringement by the Treasury department. The authors argued that cartoons involved an "inseparable marriage of literary and visual matter," and visual images were necessary to illustrate "the incredible use of racial, ethnic, professional, political slurs and stereotypes which are the very essence of Disney graphic matter." (Letter from A. Dorfman, A. Mattelhart, and S. Siegelau to Custom Compliance entitled *6 Reasons Why No Cartoon Matter, No Book*, (Aug. 12, 1975). The Department ruled that the use of the cartoon frames did "not appear to be a substantial appropriation of a material part of any one copyrighted work" (Letter from Eleanor M. Suske, Chief of Imports Compliance, to Peter Weiss, Center for Constitutional Rights (June 9, 1976).

95. 17 U.S.C. app. § 101 (1976).

circumscribed: "under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short motion picture for criticism or comment."⁹⁶

How short must such a fair use be? It has been argued both that an arbitrary time limit should be placed on excerpts from audiovisual works, and that fair use excerption is inapplicable to audiovisual works.⁹⁷

The latter view is not difficult to understand. The climax or high adventure scenes from a movie has marketability, even when removed from the context of the entire movie. Broadcasting or screening such scenes would certainly have an adverse effect on that movie's marketability.⁹⁸

96. HOUSE REPORT, *supra* note 25, at 72.

97. See Timberg, *New Forms of Media and the Challenge to Copyright Law*, in FAIR USE AND FREE INQUIRY—COPYRIGHT LAW AND THE NEW MEDIA 254 (J. Lawrence & B. Timberg eds. 1980).

98. See note 75 and accompanying text, *supra*.

The problem of obtaining a work in order to excerpt it differs greatly for the literary and the audiovisual critic. The literary critic simply buys (or is sent) a copy of the work, and copies out the appropriate passages. The audiovisual critic can always view the film, but may have difficulty obtaining a copy of the film or video work from which to take the clip necessary for his criticism. Many audiovisual works can be purchased, but the selection of first-run movies, older and lesser-known works, and almost all television shows is very limited.

One video mail order catalogue, Video Preview Magazine (1981), available through Video City Mail Order Co., Lafayette, Ca., listed over 2000 videotape and video-disk selections including movies, concerts, sporting events, and television shows. However, none of the current and only a handful of the previous year's Academy Award nominees were listed.

A critic may be able to obtain footage free of charge from the producer, much as a book critic gets free copies from the publisher. Both the publisher and the producer have promotion in mind when they offer their product, but there the similarity ends. The producer generally does not offer the entire product but only selected shorts. In one such arrangement between a movie producer and the producer of a television "magazine"-type show, agreement between Warner Bros. and Videowest Productions, February 4, 1981, the movie producer licensed the use of pre-selected excerpts from a movie then being released. Airtime was limited by agreement not to exceed Screen Actor Guild limitations, of no more than two minutes and thirteen seconds of any one scene, and no more than four minutes and twenty-six seconds of two or more scenes.

The difficulty with this arrangement is obvious. Not only can the movie producer select the portions that the critic must work with, thus limiting the freedom and effectiveness of the critic, he can also deprive a possibly unfriendly critic of any access to the movie. Furthermore, limitations on length, whether set by the producer or the Screen Actors Guild, are highly artificial as applied to the critic.

Another way for the critic to obtain audiovisual material is to copy it himself, either off television or from material obtained from archives or commercial rental. To do so, however, can subject the critic/copier to another infringement charge. In *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that off-the-air copying of copyrighted materials in one's

The most likely medium for the fair use of audiovisual materials is television, which can accomodate frequent reviews of movies and television programs, and can provide a broader audience more quickly than movies or documentaries, which require more involved distribution. In addition, with the prospect of community involvement in cable television,⁹⁹ television is also the most accessible medium for critics.

Television-based criticism is likely to be one of two sorts: the review of newly released films and television shows, and retrospectives of a director's or actor's works, or a genre. A review of a recently released film has as its subject the film, and every aspect of the film's art: the acting, camera angles and so forth. The subject of the film reviewed—cowboy and indian wars, a star-crossed romance—would not be the subject of the review. The subject of the film is of little interest to a viewer of the review, who is looking for an evening's entertainment, or enjoying a critic's wit.

The maker of a retrospective walks a finer line. With a less clear-cut purpose than a reviewer of current films, he risks exploiting the films he examines. For example, a retrospective of horror films could easily adopt the subject of the films analyzed—frightening its audience—in addition to its rightful subject of the films' art.

Some of a movie's vulnerability to excerption comes from its visual properties—the subject and its expression are united in the visual image. Yet there is an element present in an audiovisual work that is not present in the single visual image—the

own home for private non-commercial use constituted infringement. *Id.* at 969. The court also declined to call this kind of use fair. *Id.* at 971. As for non-off-the-air copying, the court held that the legislative history applicable to sound recording granting a home-recording exemption did not apply to audiovisual recording. *Id.* at 968. Consequently, if a critic makes a copy of a film or television show in order to formulate his criticism, his doing so would constitute infringement.

If, however, the critic passes the first barrier and has legitimately obtained a copy from which to take excerpts for his criticism, it is clear that the decision in *Universal City Studios* does not make him an infringer for using those excerpts in his criticism. In discussing the types of exclusions covered by the fair use doctrine, the court distinguished the wholesale copying of audiovisual materials from other types of use by focusing on the first sentence of § 107, where use in criticism is listed as an area where fair use can be applied: "fair use has traditionally involved what might be termed the 'productive use' of copyrighted material It is noteworthy that the statute does not list 'convenience' or 'entertainment' or 'increased access' as purposes within the general scope of fair use." *Id.* at 970.

99. See Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT L.J. 1 (1981).

element of time. The length of movies makes possible the development of other subjects not directly linked to the visual image. For instance, story line, character development, and other characteristics which are fundamental to the novel and which can be the subject of any book review can also be fundamental to the audiovisual work. When an excerpt is used from a movie, the entire work is not expropriated; only a fraction. A movie is too long for a criticism to expropriate all of it, just as a book review cannot reprint the entire book. The single visual image, on the other hand, can be encompassed in an instant by modern audiovisual methods.

Because of the time element, less damage is done to the market value of a two-hour film by the use of only a few minutes in a commentary or criticism than is done to a single image by any kind of copying. For the purpose of fair use, excerption from film or video is more analogous to excerption from a book than it is to the use of a single visual image.¹⁰⁰

It follows that if film and video critics are to enjoy the same freedom and stature as literary critics, they should have similar legal rights in the use of the artistic work. Criticism, whether of the great American novel or of a Hollywood preview, is necessary to inform the public of the artistic merits and entertainment value of any work. Fair use, by allowing illustration to supplement analysis, serves an essential part in criticism and should not be denied the audiovisual critic.

V

Roy Export and Iowa State

Substantial case law does not exist dealing with the fair use of audiovisual material. The litigious attitude taken by media corporations with property to protect has discouraged the fair use of films and television programs.¹⁰¹ Two recent cases have

100. The 'element of time' concept is not necessarily limited to audiovisual works. Comic books, while joining the subject and expression of the artist in the individual panel, have story lines and character developments that extend for several pages. The analogy made in this article between films and literary works could also be made between comic books and literary works. In *Walt Disney v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), the court rejected the defense of fair use because the defendant took more than was necessary to "conjure up" the plaintiff's comic book characters for the purpose of parody. *Id.* at 758. If excerpts of one of the plaintiff's comic book stories were used in a critique of the comic book, such as its story or its characters, the court may well have allowed a fair use defense. See note 94, *supra*.

101. "Willingness [of media corporations] to litigate, in conjunction with some

dealt with the fair use of film—*Roy Export v. Columbia Broadcasting System*¹⁰² and *Iowa State Univ. v. American Broadcasting and ABC Sports, Inc.*,¹⁰³— with large media corporations raising the defense of fair use.

A. The Cases and Findings

1. *Roy Export*

CBS put together a retrospective of Charlie Chaplin comprising excerpts from several of his films. Some of the films were in the public domain, and the rights to others were owned by the plaintiffs. When CBS asked the plaintiffs for permission to use the excerpts the plaintiffs refused, but twice offered to license CBS the use of a compilation they had made. CBS turned them down, and shortly after Charlie Chaplin's death aired their own version, 40% of which consisted of the plaintiffs' copyrighted films.¹⁰⁴ The jury found infringement by CBS, who asked for a judgment notwithstanding the verdict, or in the alternative, a new trial. The trial judge rejected this motion.

2. *Iowa State*

Iowa State University was the owner of the rights to "The Champion," a film about wrestler Dan Gable, who went on to win a gold medal at the 1972 Munich Olympics. The film was made by a student, to whom the university gave permission to license the rights to television. ABC turned down the film, but

properties of imagery that differentiate it qualitatively from print . . . has resulted in almost monopolistic control over visual materials. Consequently, visual images are far less accessible than printed materials for discussion and criticism." Lawrence, *Copyright Law, Fair Use, and the Academy: an Introduction*, in *FAIR USE AND FREE INQUIRY—COPYRIGHT LAW AND THE NEW MEDIA* 8 (J. Lawrence & B. Timberg eds. 1980). For accounts of such litigation, see other essays in *FREE INQUIRY: Beltz, Unwriting the Story of Rock*; Lawrence, *Donald Duck v. Chilean Socialism: A Fair Use Exchange*; and Lawrence, *The Administration of Copyrighted Imagery: Walt Disney Productions*.

102. 503 F. Supp. 1137 (S.D.N.Y. 1980).

103. 621 F.2d 57 (2d Cir. 1980).

104. Quantity. 40% of CBS' compilation was made up of excerpts from Chaplin films to which the plaintiffs owned the rights. Eleven scenes from five films were used: 1 minute 45 seconds from the 1 hour 20 minute film "City Lights"; 3 minutes 45 seconds from the 1 hour film "The Kid"; 1 minute 25 seconds from the 1 hour 12 minute film "The Circus"; 55 seconds from the 1 hour 29 minute film "Modern Times"; and 1 minute 15 seconds from the 1 hour 12 minute film "The Gold Rush". 503 F. Supp. at 1145. In all, 9 minutes and 5 seconds were used from a total of 6 hours and 13 minutes of the plaintiffs' films, or less than 3%.

Quality. CBS admitted that the scenes it used were among Chaplin's best.

secretly made a copy and aired segments of the film during its broadcast of the 1972 Olympics.¹⁰⁵ The university sued, and the district court found infringement and awarded damages.¹⁰⁶ The verdict was upheld by the Second Circuit Court of Appeals.¹⁰⁷

B. Corporate Theft

A significant innovation in the doctrine of fair use in these two opinions was the courts' emphasis on "bad faith" conduct by the defendants. In both cases, negotiations had been held to secure the rights to the films,¹⁰⁸ and there was no question that the owners expected payment for the use of the films. In both cases, the defendants made or obtained copies and used what they wanted, without any payment to the plaintiffs.

In ruling on ABC's defense of fair use, the court in *Iowa State* held that since the doctrine is "entirely equitable," ABC's conduct was relevant.¹⁰⁹ "The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."¹¹⁰ In sustaining the jury's finding of bad faith and the award of punitive damages, the court in *Roy Export* cited *Iowa State* and *Time, Inc. v. Bernard Geis Assoc.*: "[f]air use presupposes 'good faith and fair dealing'".¹¹¹

In both cases the defendants' conduct not only showed bad faith in their dealings with the plaintiffs, but demonstrated a cynical attitude in their invocation of the fair use defense. By raising the defense of fair use, they attempted to ennoble their

105. Quantity. ABC admitted broadcasting a total of 2 minutes and 30 seconds of the plaintiff's film, some of it on three occasions. 621 F.2d at 59. This amounted to approximately 8%.

Quality. Rejecting ABC's argument that the amount used was insignificant, the court said that ABC must have "found this footage essential, or at least of some importance . . ." *Id.* at 61.

106. 463 F. Supp. 902 (S.D.N.Y. 1979).

107. 621 F.2d 57 (2d Cir. 1980).

108. In *Iowa State* the student offered to license the film to ABC, and in *Roy Export* the plaintiffs offered to license their compilation.

109. *Id.* at 62.

110. *Id.* at 61.

111. 293 F. Supp. 130, 146 (S.D.N.Y. 1968). The decision in *Time, Inc. v. Bernard Geis Assoc.* allowed the fair use by the defendant of the copyrighted "Zapruder film" of the Kennedy assassination. The main factor in favor of the defendant was the "public interest in having the fullest information available on the murder of President Kennedy." *Id.* at 146. A major factor weighing against the defendant was the subterfuge involved in obtaining a copy, in defiance of the plaintiff's wishes.

taking, but their original aims were obvious. CBS claimed that its use of the Chaplin films was "essential to acquaint the public with the artistic genius" of Chaplin, and that "the public benefit . . . outweighed the copyright owner's interest."¹¹² CBS simply wanted to show their own compilation, rather than the plaintiffs', without paying for it. Despite ABC's claim that it was engaged in the "laudable pursuit of disseminating the life history of an important public figure,"¹¹³ (wrestler Dan Gable), they were simply expropriating another's property to use as "color" for their sports broadcast.

C. Critical Use in *Roy Export* and *Iowa State*

The networks did not argue that their use was criticism, but an analysis of their fair use defenses is useful for two reasons. First, it illustrates how the "subject of criticism" analysis can be applied to the use of film clips. Second, the networks' argument that their use of the plaintiffs' works was for "historical and biographical" purposes should be examined to distinguish these purposes from critical ones.

In neither *Roy Export* nor *Iowa State* could the networks' use be considered criticism or comment on the expression in the original work. ABC and Iowa State had the common purpose of documenting the life of Dan Gable the wrestler. The subject of the plaintiff's film was not the film itself, but the subject of the film. Since the film was not the subject of ABC's commentary, ABC had no justification for using the film under the fair use doctrine.

The *Roy Export* case is somewhat different. Chaplin's films could be considered the subject of CBS' use. That use, however, could not be considered film criticism, and was commentary of only the most insignificant kind. The actual subject of CBS' compilation was not Chaplin the performer or film maker, but Chaplin the recently deceased public figure. CBS was not criticizing Chaplin's techniques or his films, but his celebrity. It might be argued that an obituary, in its celebration of a person's achievements, has the right to use copyrighted material to show those achievements. The court in *Roy Export* acknowledged that "the public interest in Chaplin at the time

112. 503 F. Supp. at 1143-44.

113. 621 F.2d at 60.

of his death may make the fair use defense relevant.”¹¹⁴ An obituary is a critique of sorts, but it is a critique of the person, and any examination of a person’s work is clearly secondary. The justification for fair use in criticism is that illustration is essential to criticism.¹¹⁵ Examples from a person’s work are not essential to a summary of that person’s life and achievements. Consequently, there is less justification in allowing fair use for this purpose.

What both the networks attempted to establish was that their use of the films was for “historical and biographical” purposes. They both cited *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹¹⁶ which approved of fair use in biographies and histories of earlier works. This was permitted in *Rosemont* because of “the public benefit in encouraging the development of historical and biographical works and their public distribution. . . .”¹¹⁷

The courts in both *Iowa State* and *Roy Export* rejected the networks’ claims of fair use for biographical purposes. The court in *Iowa State* said that *Rosemont* allowed the fair use of facts from an earlier work, not the expression of those facts: “[t]he public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts.”¹¹⁸ Accordingly, the court held that ABC could “claim no need to ‘bodily appropriate’ Iowa’s ‘expression’” of biographical information.¹¹⁹

In *Roy Export*, the court rejected the defendant’s motion for judgment notwithstanding the verdict, and concluded that the jury could have doubted that the excerpts used from the plaintiffs’ films were necessary for “proper coverage of Chaplin’s death.”¹²⁰ The court also refused to find Chaplin’s artistic expressions so newsworthy at the time of his death as to warrant

114. 503 F. Supp. at 1144. The preamble to § 107 cites “news reporting” as a possible use that could invoke a fair use defense.

115. “The cases put by courts as illustrating what is a fair use are quotations and extracts for the bona fide and avowed purpose of comment or criticism, or for the purpose of presenting the views of the writer as an authority.” *Lawrence v. Dana*, 15 F. Cas. 26, 44 (C.C.D. Mass 1869) (No. 8,136).

116. 366 F.2d 303 (2d Cir. 1966).

117. *Id.* at 307.

118. 621 F.2d at 61, *quoted in Roy Export*, 503 F. Supp. at 1144.

119. 621 F.2d at 61.

120. 503 F. Supp. at 1144.

a finding of fair use by necessity.¹²¹

The extent of the fair user's ability to appropriate the "expression" of a copyrighted work distinguishes use for criticism from use for historical or biographical purposes. The *Iowa State* court cited *Hoehling v. Universal City Studios, Inc.*,¹²² which said that "[i]n works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another."¹²³ For criticism, on the other hand, courts have envisioned greater license. Justice Story in *Folsom v. Marsh* said that a "reviewer may fairly cite largely from the original work,"¹²⁴ and the court in *Robert Stigwood Group v. O'Reilly*¹²⁵ said that while fair use cannot allow verbatim copying of a plaintiff's work, "[i]t would seem that critics may quote extensively in order to comment effectively."¹²⁶

VI Conclusion

Television and film need unrestricted analysis, and that analysis requires illustrations and examples from the work analyzed. Since the *Roy Export* and *Iowa State* cases did not directly deal with the question of fair use of audiovisual material for purposes of criticism, such use is not foreclosed by the courts' unwillingness to find fair use. The question remains open until a case directly addresses the matter. It is possible that the use of excerpts from audiovisual material for criticism, like the use of quotations from a book, may become customary without any litigation on the question at all. It is also possible, however, that the propensity of movie and television producers

121. *Id.* CBS contended that "the facts pertinent to the fair use defense were not seriously in dispute" and asked for a directed verdict. *Id.* at 1143.

122. 618 F.2d 972 (2d Cir. 1980).

123. *Id.* at 980. The *Hoehling* court expanded somewhat the ambit of the phrase "historical subjects." The defendant allegedly took from the plaintiff's novel on the Hindenberg zeppelin disaster the theory that a person who had actually been on the final flight of the Hindenberg might have sabotaged it. The court found no copyright in the plaintiff's historical interpretation and held that "broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots." *Id.* at 978.

124. 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (1841).

125. 346 F. Supp. 376 (D.C. Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096, *cert. denied*, 429 U.S. 848.

126. *Id.* at 385.

to sue¹²⁷ will work a chilling effect on critics, preventing the sort of criticism helpful to the public and the audiovisual arts.

The visual arts, with their direct linkage of subject and expression, present problems different from the other arts. The single visual image cannot readily be excerpted in criticism without great danger of exploiting the value of the entire work. The linkage of the subject and the expression is loosened in audiovisual works by the presence of time as part of the expression.

For fair use purposes, films and video works should be treated as if they were books, allowing the examples necessary for fair criticism and comment. The same limitations would apply to each, to insure that the criticism does not supplant the work criticized. Since there exists the very real danger of exploiting the most valuable parts of an audiovisual work, courts and counsel should be vigilant not only of the motives of the user, but the nature of the use. The subject of the criticism should be the art in the work—it should focus on the expression, not the subject, of the work criticized. That is the purpose of criticism, to judge “the qualities and values of the aesthetic object.”¹²⁸ That is the justification for fair use.

127. See note 101, *supra*.

128. See note 41 and accompanying text, *supra*.

